

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON**

UNITED STATES OF AMERICA,

Plaintiff,

:

Case No. 3:21-cr-068

Also Case No. 3:24-cv-193

- vs -

District Judge Walter H. Rice

Magistrate Judge Michael R. Merz

DAVID CARTER,

Defendant.

:

REPORT AND RECOMMENDATIONS

This criminal case is before the Court on Defendant's Motion to Vacate under 28 U.S.C. § 2255 (ECF No. 51). District Judge Rice has referred the Motion to Vacate to the undersigned for report and recommendations (ECF No. 53).

Upon review of the docket, the Magistrate Judge finds Defendant pleaded guilty and was thereafter sentenced on September 7, 2022 (Judgment, ECF No. 49). Defendant took no appeal and his time to do so expired thirty days later on October 7, 2022. A one year statute of limitations applies to motions to vacate and the year runs from the date on which the judgment of conviction becomes final. 28 U.S.C. §2255(f)(1). In this case, that date is October 7, 2022, when no appeal was taken. The statute began to run on that date and expired one year later on October 7, 2023. Defendant's Motion to Vacate was filed July 2, 2024, by placing it in the prison mailing system

on that date (Motion, ECF No. 51, PageID 285). See *Houston v. Lack*, 487 U.S. 266, 108 S. Ct. 2379, 101 L. Ed. 2d 245 (1988). Thus the Motion to Vacate was filed nearly nine months late and consideration of the Motion on the merits is barred by the statute of limitations.

Accordingly the Magistrate Judge respectfully recommends that the Motion to Vacate be denied with prejudice. Because reasonable jurists would not disagree with this conclusion, it is also recommended that Defendant be denied a certificate of appealability and that the Court certify to the Sixth Circuit that any appeal would be objectively frivolous and should not be permitted to proceed *in forma pauperis*.

July 11, 2024.

s/ *Michael R. Merz*
United States Magistrate Judge

NOTICE REGARDING OBJECTIONS

Pursuant to Fed. R. Civ. P. 72(b), any party may serve and file specific, written objections to the proposed findings and recommendations within fourteen days after being served with this Report and Recommendations. Because this document is being served by mail, three days are added under Fed.R.Civ.P. 6, but service is complete when the document is mailed, not when it is received. Such objections shall specify the portions of the Report objected to and shall be accompanied by a memorandum of law in support of the objections. A party may respond to another party's objections within fourteen days after being served with a copy thereof. Failure to make objections in accordance with this procedure may forfeit rights on appeal. #